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IN THE

SUPREME COURT OF THE UNITED STATES

No. 610

JOE DELEGAL,

Petitioner

Vs.

UNITED STATES OF AMERICA,

Respondent

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit.

RALPH L. CRAWFORD
508 American Building
Savannah, Georgia

December , 1959.

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IN THE

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No.

JOE DELEGAL,

Petitioner

Vs.

UNITED STATES OF AMERICA,

Respondent

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit.

Joe Delegal prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above stated case on October 27, 1959.

OPINION BELOW

The opinion of the District Court for the Southern District of Georgia (R-30, 31) is not yet reported. The opinion of the Court of Appeals for the Fifth Circuit (R-39) not yet reported, is printed in the Appendix, pages 7 to 8.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on October 27, 1959 (R-41) and a copy thereof is appended to this petition in the Appendix at page 8. A petition for rehearing was denied on November 25, 1959 (R-48), and a copy of said order is appended to this petition in the Appendix at page 9. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

On a motion filed in the District Court for the Southern District of Georgia, petitioner sought to have a plea of guilty to an indictment charging him with violation of Title 26 U.S.C. 5003 withdrawn, to plead not guilty instanter and to be tried by a jury. The District Court held that petitioner did not have the right to withdraw said plea and the Court of Appeals for the Fifth Circuit affirmed.

The question presented is

1. What amounts to an abuse of discretion on the part of the trial judge in denying a person the right to withdraw a guilty plea to a criminal indictment and plead not guilty and be tried by a jury.

STATUTES INVOLVED

The statutory law involved is the Federal Rules of Criminal Procedure. The pertinent portions of these are printed in the Appendix at pages 7 to 9.

STATEMENT

On the 13th day of May, 1958, an indictment was filed in the United States District Court for the Southern District

of Georgia against the petitioner charging him with unlawfully, wilfully and knowingly possessing distilled spirits, to-wit: 32 gallons of non-tax paid whiskey.

On the 10th day of November, 1958, during the November Term, 1958, of the District Court a Plea of Guilty was entered and signed by the attorney for the petitioner, J. Saxton Daniel, the presence of petitioner in the Court at the time of the entering and signing of the guilty plea was in question as was also the question of whether or not the petitioner authorized his attorney to so enter this plea of guilty. Sentencing was deferred to a later date.

On the 11th day of February, 1959, the petitioner appeared in the said District Court and after hearing of evidence by the United States and argument on behalf of petitioner for a probated sentence the petitioner was sentenced to be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years. The question of whether or not the petitioner realized what was taking place at this hearing on the 11th day of February, 1959 was in question.

On the 25th day of February, 1959 petitioner filed with the District Court for the Southern District of Georgia a Motion to allow him to withdraw his plea of guilty and to plead not guilty instanter to the indictment. A hearing was heard on said motion on the 27th day of March, 1959 and after introduction of evidence the motion was denied. (R 30-31).

Petitioner then appealed to the Court of Appeals for the Fifth Circuit. That Court affirmed the District Court (Appendix, page 8). Its opinion (Appendix page 8 R. 39) shows that it made one holding which was the withdrawal of a plea of guilty is committed to the sound discretion of the District Court and no abuse of it is shown in the record.

REASON FOR GRANTING THE WRIT

The character of reasons for granting the writ as expressed in Rule 19 are presented here, to-wit: the decision of the Court below has decided important question of Federal law which has not been but should be settled by this Court; also it is in conflict with the decision of other Courts of Appeal on the same matter. Each of these considerations governing review on certiorari will be specifically treated in that order.

Important Question of Federal Law.

The Court of Appeals misapplied Rule 32 (d) of the Rules of Criminal Procedure in holding that the trial judge did not abuse his discretion in disallowing the motion of petitioner's to withdraw his plea of guilty.

This question is of the utmost importance not only to the petitioner but to all other persons in the United States that are charged with criminal violations.

The Court have held in United States vs. Lias, 173 F2d 685, that the right of an accused to withdraw a plea of guilty is left to the discretion of the trial judge.

Realizing that there is not in existence a yardstick for the trial judges to use in exercising their discretion, the question as to whether or not this discretion is abused must be determined on each individual case.

In the instant case the record shows that at the time the plea of guilty was entered the accused was not questioned as to the plea, or was not in anyway appraised of the consequence of this plea, or was not even asked if he understood such plea. (R 6 & 7). On the motion to withdraw said plea, it is clear from the evidence that the petitioner did not understand at the time said plea of guilty was entered that he understood the consequence of said guilty plea. The record also shows that the petitioner is a person of very low

intelligence and in most instances moral and social standing have no place in these people's lives and most certainly a conviction of a criminal offense with a probated sentence has the same meaning to them as not guilty. In other words if the majority of these types of people are charged with a criminal offense and are not guilty they had just as soon plead guilty and be given a probated sentence than be tried and found not guilty. Courts and trials have a tendency to frighten these people beyond the realm of realizing the necessity of such judicial proceedings and that such proceedings are for their benefit.

Taking these facts into consideration the trial judge should be more liberal in granting a motion to withdraw a plea of guilty for such persons and on the other hand less should be required to show an abuse of discretion on the part of the trial judge.

In the case of Bergen vs. United States, 145 F2d. 181 the Court stated, "that the Courts' discretion should be exercised liberally, so as to promote the ends of justice and to safeguard the life and liberty of the accused, especially when the defendant is without benefit or advice of counsel and his motion is reasonably made; and in any case the motion should not be denied when it is evident that the ends of justice would best be served by granting it. Also in the case of United States vs. Lias, 173 F2d 685, the Court held "Defendant should ordinarily be permitted to withdraw a plea of guilty, which was entered by mistake or under a misconception of the nature of charge, or a misunderstanding as to its effect, through fear, fraud or official misrepresentation or involuntarily for any reason, or if it was entered inadvisably if any reasonable ground is offered for going to the jury".

In the dissenting opinion by Judge Stephens in the case

of Collins vs. U. S. 176 F2d 773 he stated "Whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record . . . " one, who so pleads may be bound thereby, but it is imperative that the chosen course of action be undertaken with full knowledge of the facts and probable consequence and preferably after legal advise."

Taking into consideration the three above cases and the meaning thereof it is determined that all three hold that the discretion of the trial judge should be liberally exercised and the right to withdraw a plea of guilty should be granted upon any reasonable grounds being shown to entitle the accused to a jury trial.

This Court has never passed upon this question, which is indeed one of substance and importance. It is necessary that this Court determines the extent of the trial judge's discretion and provide the trial judges with a guide for them to determine when a plea of guilty should be allowed to be withdrawn. Therefore, this Court should for the reasons above grant the writ.

CONFLICTING DECISION BY DIFFERENT COURTS OF APPEAL

On the question decided by the Court of Appeals for the Fifth Circuit there is a definite conflict between it and those of other Courts of Appeal.

First, the decision of the Fifth Circuit Court as to this question, the abuse of discretion of the trial judge, is contrary to the Fourth Circuit Court of Appeals in United States vs. Lias, 173 F2d 685, and the Eighth Circuit Court of Appeals in Bergen vs. United States, 145 F2d 181, which decision has not been disturbed by this Court.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

RALPH L. CRAWFORD

P. O. Address
508 American Building
Savannah, Georgia.

APPENDIX

OPINION OF THE COURT OF APPEALS IN THE UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT.

No. 17725

JOE DELEGAL,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Georgia.

(October 27, 1959.)

Before RIVES, Chief Judge, and TUTTLE and BROWN, Circuit Judges.

PER CURIAM: This is an appeal from a denial by the District Court of a Motion under F. R. Crim. P. 32 (d) to set aside a sentence of imprisonment and a prior plea of guilty to a one-count indictment charging violation of 26

USCA Sec. 5008 (b) (1) (1955). The only basis for the motion was that at the time of entry of the plea of guilty the defendant, appellant here, was not personally present in court and the plea had been entered by his counsel without his knowledge or full consent. The District Judge heard the evidence and found that both at the time of the entry of the plea, November 10, 1958, and at the time of sentence, February 11, 1959, appellant and his counsel were present in court and the plea was knowingly made. Withdrawal of a plea of guilty is committed to the sound discretion of the District Court and no abuse of it is shown here. Williams vs. United States, 5 Cir., 1951, 192 F.2d 39; Mitchell v. United States, 5 Cir., 1950, 179 F.2d 305.

AFFIRMED.

JUDGMENT

EXTRACT FROM THE MINUTES OF OCTOBER 27, 1959.

JOE DELEGAL,

No. 17725.

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia and was taken under submission by the Court upon the record and briefs on file:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

ORDER DENYING REHEARING

EXTRACT FROM THE MINUTES OF NOVEMBER 25, 1959.

JOE DELEGAL,

No. 17725.

versus

UNITED STATES OF AMERICA.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

RULES OF CRIMINAL PROCEDURE

JUDGMENT

Rule 32. Sentence and judgment. (a) Sentence.

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has on this date served a true copy of the foregoing petition, brief and record on the United States Government by mailing same to the Solicitor General for the United States at his office in Washington, D. C. and to the District Attorney for the Southern District of Georgia at his office in the Post Office in Savannah, Georgia with postage affixed to insure delivery.

This ___ day of December, 1959.

RALPH L. CRAWFORD

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No. 618

In the Supreme Court of the United States

OCTOBER TERM, 1959

JOE DELEGAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM R. WILKEY,
Assistant Attorney General,

BEATRICE ROSENBERG,
Attorney,

Department of Justice,
Washington 25, D. C.

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CITATIONS

Cases:

Friedman v. *United States*, 200 F. 2d 690, certiorari denied, 345 U.S. 926 — 4

United States v. *Marcus*, 213 F. 2d 230, certiorari denied, 348 U.S. 824 — 4

Rule:

Rule 32(d), F. R. Crim. P. — 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 610

JOE DELEGAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7-8) is reported at 271 F. 2d 279. The findings and conclusions of the district court (R. 30-31) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1959. A petition for rehearing was denied on November 25, 1959. The petition for a writ of certiorari was filed on December 24, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's motion, after sentence, to withdraw his plea of guilty was properly denied.

RULE INVOLVED

Rule 32(d), F. R. Crim. P., provides:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

Petitioner pleaded guilty on November 10, 1958, in the United States District Court for the Southern District of Georgia, to an indictment charging him with knowingly possessing 32 gallons of non-tax paid whiskey in violation of 26 U.S.C. (1952 ed., Supp. V) 5008(b)(1) (R. 2, 4). On February 11, 1959, he was sentenced to two years' imprisonment (R. 12).

On February 27, 1959, petitioner made a motion to withdraw the plea, stating that the plea of guilty had been entered on November 10, 1958, by petitioner's attorney without petitioner being present; that petitioner first learned of the plea when he appeared for sentencing on February 11, 1959; that he allowed the plea to stand without objection for the reason that he was advised that such a plea offered the only possibility that he might obtain probation; but that he was not guilty of the offense charged (R. 13-15).

Petitioner testified to this effect at a hearing on the motion (R. 18-25). The transcript of record showed that, when the plea was entered on November 10, 1958, and sentence deferred to a later date, the trial judge addressed the petitioner directly, asking him whether he was related to the Delegals in Brunswick, and that petitioner stated that he was one of the Delegals from Liberty County (R. 4-5). In addition, petitioner's former attorney testified that petitioner was present when the plea of guilty was entered; that, from the time petitioner engaged him, petitioner told the attorney that he wanted to plead guilty and wanted his attorney to do what he could to get him probation; and that the attorney expressed doubts as to the possibility of probation because petitioner had a prior record (R. 27). The transcript of the proceedings at the time of sentencing shows that petitioner's attorney argued that petitioner should be given probation because of the fact that he was supporting a sister and her children as well as his own, but that the judge refused to suspend sentence because of petitioner's prior record (R. 6-11).

The district court denied the motion to withdraw the plea, finding that petitioner "was present in Court and consented to the entering of the plea" and that "no facts appear entitling [petitioner] to withdraw his plea" (R. 30). The court of appeals affirmed.

ARGUMENT

Under Rule 32(d), a motion to withdraw a plea of guilty after sentence may be granted only "to cor-

rect manifest injustice." No such showing was made here. Petitioner was present at the time the plea was entered and at the time of sentencing.

The record supports the conclusion that petitioner's plea was knowingly entered in the hope that his attorney could persuade the district court to suspend sentence. Disappointment in the sentence is not a basis for permitting withdrawal of a plea. *United States* v. *Marcus*, 213 F. 2d 230 (C.A. 7), certiorari denied, 348 U.S. 824; *Friedman* v. *United States*, 200 F. 2d 690, 696-697 (C.A. 8), certiorari denied, 345 U.S. 926. Certainly, under these circumstances, the district court did not abuse its discretion.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JANUARY 1960.

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